STATE OF MICHIGAN

COURT OF APPEALS

JULIA CRIPPS,

Plaintiff-Appellee,

v

MECOSTA COUNTY GENERAL HOSPITAL,

Defendant/Third-Party Plaintiff-Appellant,

and

JESUS HERNANDEZ, JR., M.D., and MICHIGAN EMERGENCY PHYSICIANS, LLP,

Third-Party Defendants.

UNPUBLISHED
February 23, 2006

No. 262951
Mecosta Circuit Court
LC No. 01-014338-NM

JULIA CRIPPS,

Plaintiff-Appellee,

v

MECOSTA COUNTY GENERAL HOSPITAL,

Defendant/Third-Party Plaintiff,

and

JESUS HERNANDEZ, JR., M.D., and MICHIGAN EMERGENCY PHYSICIANS, LLP,

Third-Party Defendants/Appellants.

No. 262962
Mecosta Circuit Court
LC No. 01-014338-NM

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

In these consolidated appeals, defendant and third-party defendants appeal by leave granted from an order denying their motions for summary disposition under MCR 2.116(C)(10) and ruling that MCL 600.2912a(2) did not preclude plaintiff's medical malpractice claim. We reverse.

A denial of summary disposition is reviewed de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing a decision under MCR 2.116(C)(10), we consider all documentary evidence in the light most favorable to the non-moving party, affording all reasonable inferences to the nonmovant, to determine whether there is any genuine issue of material fact that would entitle the non-moving party to judgment as a matter of law. *Knauff v Oscoda Co Drain Comm'r*, 240 Mich App 485, 488; 618 NW2d 1 (2000); *Wilcoxon, supra* at 357-358. "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must set forth specific facts showing that a genuine issue of material fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Mere speculation and conjecture are not sufficient to establish a genuine issue of material fact. *Detroit v GMC*, 233 Mich App 132, 139; 592 NW2d 732 (1998). Statutory interpretation is similarly a question of law which we review de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

Defendants claim that MCL 600.2912a(2) bars plaintiff's claim. MCL 600.2912a(2) provides:

> In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

Thus, the primary issue at hand is whether plaintiff has presented specific facts that would support a finding that her "injury more probably than not was proximately caused by the negligence of" Dr. Hernandez. "As a matter of logic, a court must find that the defendant's negligence was a cause in fact of the plaintiff's injuries before it can hold that the defendant's negligence was the proximate or legal cause of those injuries." *Craig v Oakwood Hosp***,** 471 Mich 67, 87; 684 NW2d 296 (2004). Here, plaintiff's experts opined, at best, that the alleged negligence of Dr. Hernandez *might* have worsened or exacerbated plaintiff's condition. None were willing to opine that the alleged negligence had *more likely than not* caused any injury to plaintiff, despite the fact that all three experts were directly asked that question numerous times. Instead, plaintiff's experts only offered statements that, in general, the earlier such a condition was treated, the better the result. To find for plaintiff based on this evidence, a jury would have to assume that because earlier treatment might have led to a better result, it must have in this case. Such speculation and conjecture are insufficient, *GMC, supra* at 139, to establish that the

injury was more probably than not caused by Dr. Hernandez's alleged act of negligence. MCL 600.2912a(2). Furthermore, "a plaintiff cannot satisfy this burden by showing only that the defendant may have caused [the] injuries. Our case law requires more than a mere possibility or a plausible explanation." *Craig*, *supra* at 87.[1]

Additionally, the final sentence of MCL 600.2912a(2) also bars recovery because plaintiff provided no testimony that her actual *opportunity* to obtain a better result would have been greater than fifty percent. All of plaintiff's experts refused to opine that it was more likely than not that plaintiff would have had a more favorable recovery with earlier treatment, although they opined that it was possible. Thus, even if the evidence would have supported a finding that plaintiff lost an opportunity to achieve a better result, it would not have supported any finding that the lost opportunity to a achieve a better result was itself greater than fifty percent as required by MCL 600.2912a(2). *Fulton v Pontiac General Hosp*, 253 Mich App 70, 77-78; 655 NW2d 569 (2002).[2] Although the trial court indicated that MCL 600.2912a(2) did not apply because this case was not subject to a numerical interpretation, the statute contains no exceptions for situations where a plaintiff cannot establish that he or she lost an opportunity of greater than fifty percent for a better result.

Finally, the trial court indicated the paramount issue was whether Dr. Hernandez breached the standard of care, resulting in less time to treat the condition, and that if the trier of fact agreed, recovery would be permitted. However, even if defendant breached the standard of care, which led to less time to treat the condition, that alone cannot yield recovery. Plaintiff also must meet the requirements of MCL 600.2912a(2).

Accordingly, the trial court erred in denying the defense motions for summary disposition with respect to the alleged negligence of Dr. Hernandez. We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Helene N. White
/s/ Karen M. Fort Hood

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[1] It should be noted that one expert agreed with a statement made by plaintiff's attorney that plaintiff would have had a better result had she been treated earlier. However, this conclusory statement cannot be deemed sufficient to meet MCL 600.2912a(2), since the same doctor had early indicated repeatedly that he could not say that it was more likely than not that the negligent act had actually harmed plaintiff. See *Rose v Nat'l Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002) (conclusory statements of breach of duty insufficient to create genuine issue of material fact).

[2] In *Ensink v Mecosta Co General Hosp*, 262 Mich App 518, 529-530; 687 NW2d 143 (2004), a panel disagreed with the *Fulton* decision, but was compelled to follow it, MCR 7.215(J)(2). However, a special panel was not convened to resolve the disagreement.